SO YOU WANT SUMMARY JUDGMENT IN AN EMPLOYMENT DISCRIMINATION CASE

I. INTRODUCTION

Summary judgment is the essential arrow in an employment defense attorney's quiver. When properly deployed on a correct flight it can pierce through the heart of a plaintiff's weak case and result in victory which, in addition to making you look good, will save your client a lot of money and time that otherwise would be unnecessarily expended. Even if summary judgment does not dispose of a case in its entirety, it may still be appropriate if it is likely to narrow the issues for trial, assuming you are not merely making the plaintiff's job easier (by focusing the plaintiff's attention on his more viable claims) in doing so. It also can provide the impetus for settlement as, possibly for the first time, the plaintiff will have to confront weaknesses in its case. While there are certainly employment cases in which summary judgment is inappropriate because the case is dependent on factual issues in dispute, it should always be considered. And planning for summary judgment is, in many ways, good planning for trial. What follows are some practical tips to prepare for and execute a winning summary judgment motion.

II. SUMMARY JUDGMENT SHOULD BE AT THE FOREFRONT FROM THE GET-GO.

Defense Counsel have to know and understand the employer's rationale for an adverse employment action if you want to have any chance at convincing a judge, federal or state, that this reason is legitimate and not a pretext for discrimination. If you are involved in the decision-making, make sure that the decision process will withstand later scrutiny. Don't be afraid to ask hard questions. If you don't ask them, the judge certainly will. Communications should be consistent with the justification to be articulated; documents and other evidence should be reviewed to make sure that there is no pretext. Insofar as the employer must explain its rationale, be accurate and be broad (do not overly confine) as to the rationale.

Often, however, defense lawyers don't get involved until the administrative stage in a discrimination case or until a suit is filed in a wrongful termination claim. It is imperative in either case that you investigate the matter thoroughly before putting your client's rationale down in writing. Rationales for adverse employment action can evolve and be refined as a case develops. Most employment lawyers have had the dizzying experience of learning of a decision-maker's reasoning for the first time when preparing that person for deposition or worse, at deposition itself. A thorough investigation by defense counsel at the outset can help crystalize the decision-maker's thinking and ensure that the position you put forth in your answer or your response to a Human Rights Commission Charge is one you are comfortable defending. Discovering a solid ground for summary judgment late in the case that is inconsistent with your initial position statement will make easy pickings for plaintiff's counsel. It is also incumbent on defense counsel to understand the applicable policies to the extent relied on or ignored by the employer in making an adverse employment decision. Deviation from policy can be an alternative means for proving pretext. Finally, it is important to determine at the outset whether there are other individuals similarly situated to the plaintiff who might serve as comparators.

In conducting that initial investigation counsel will want to do what it should do in any case; learn about the client—the nature of its business or industry; its structure, locations, unique regulatory requirements, etc. Sometimes, a visit to the worksite may be beneficial in understanding the client and the case. Counsel should also ask about the client's employment litigation history as well as their document preservation practices and policies. If the company has not yet sent a "litigation hold" memorandum to all relevant employees, the lawyer should make sure this is done immediately. Bad record handling, or anything giving rise to an unpleasant whiff of spoliation, can create a question of fact that will doom a nascent summary judgment motions.

Fact-gathering and witness interviews should be conducted in person if possible. The rationale advanced for the adverse employment action has to account for all the bad facts as well as the good ones. Counsel should speak with all of the witnesses who might have information; not just those whom HR or the CEO thinks will support the employer's position.

Counsel should obtain all documents, including the plaintiff's personnel records, prior complaints, or EEOC charges; internal investigation materials; the company handbook; and the company's policies regarding discrimination, harassment, and retaliation as well as any policies relied on with regard to the adverse decision. The purpose, of course is to make sure that you are not articulating a rationale that is undermined by your own files. It may also be helpful to find out if the plaintiff has given any statements to unemployment or another agency that might contradict what he or she is saying now.

KNOW THE LAW

It seems basic, but identifying the elements of the claim and defenses is a good way to prepare a checklist that can be used as a guide for building the case for summary judgment. Even if counsel is familiar with the concepts such as disparate treatment, disparate impact, harassment and retaliation, it can't hurt to read the statute and to learn the federal court's jurisprudence applying the differing burdens of proof to the plaintiff's claims and to the company's affirmative defenses. Counsel must read the recent cases from the circuit court and the district court**. [Cite]** These will often provide a roadmap for a winning or losing argument. Counsel should keep in mind the way in which certain claims, such as FMLA and ADA violations, relate or conflict and that the claims will need to be analyzed separately.

By focusing on the elements of the claim before engaging in any discovery counsel will be doing what the court will do later on when considering your motion. How is the plaintiff going to prove each element? How is the defense going to disprove it? This will help pinpoint the critical issues in discovery.

WHAT'S YOUR STORY

Judges are just like regular people (well, sort of). In order for the court to rule for the defense on summary judgment it will require something more than a mechanical application of the law. The defense needs to provide a compelling narrative to the court. The theme of the case must be identified case as soon as possible and also the facts that will support it. Discovery requests are built around those facts.

Counsel should identify what makes this case different. Every termination case is, at some level, about performance but why is excellent performance a requisite in this industry? Are there safety or policy reasons why it is not sufficient for someone to do just the bare minimum? Is the plaintiff someone who is unwilling to take responsibility for his actions and his own lackluster performance? Counsel is missing a big opportunity to make headway with the court if it merely "defends" and lets the plaintiff dictate the narrative.

Once counsel has identified the theme, she should draft the facts as she thinks she can prove them. Counsel should prepare a summary of the documents reviewed and witnesses interviewed and distill them down to a two or three minute story of what matters most.

In a separate folder counsel should identify the "facts" that stand in her way. This helps to identify factual discrepancies, further facts needed to support defenses, holes to exploit in the plaintiff's case, additional documents for review, additional individuals to interview, and questions to ask at depositions. This will also give counsel a realistic idea of the strengths and weaknesses of the plaintiff's claims and the company's defenses, and will be invaluable when preparing discovery or for use in depositions or settlement conversations.

RLEVANT DISCOVERY REQUESTS

As soon as possible, counsel should consider potential informal sources of information; such as internet searches, private investigators, background checks, and FOIA materials. The defense should also send out "formal" discovery requests (interrogatories, document requests, and requests for admissions) and a deposition notice as early as possible. Counsel should consider requests for admissions but must keep in mind that these are answered by the plaintiff's attorneys. The same is true for interrogatories with the exception of damages inquiries. In a deposition, counsel has a much better chance of getting a damaging admission that will help in obtaining summary judgment than in written interrogatories. Document requests should be broad wnough to obtain all documents that pertain to material allegations of the complaint. Counsel should consider an admonition in the written discovery requests that failure to answer or produce will lead to defense taking the position that the information not provided will not be admissible in opposing your dispositive motion. Fed R. Civ. P 26 and 37.

PREPARE DISCOVERY ANSWERS AND RESPONSES THAT ARE FACTUALLY ACCURATE AND CONSISTENT WITH YOUR THEME(S).

The less information provided in response to discovery requests the more constrained your arguments will necessarily be. Counsel should not hold back on information just for the sake of doing so. If the information is going to be needed, it has to be produced. If counsel has not been able to speak with individual managers before, it he has to do it now. Sometimes clients do not want to disturb managers and other busy colleagues in the discovery process. More often than not, this is a mistake.

AN EFFECTIVE PLAINTIFF'S DEPOSITION

The plaintiff's deposition is the key event in the case. The opportunity must not be wasted.

- Is the plaintiff in a protected class?
- Did he/she suffer an adverse employment action?
- Who took the adverse action? Supervisor? Co-Worker? Third Party?
- Did the employer have a legitimate business reason for the decision? Can you establish that the plaintiff has no evidence that the reason was not legitimate?
- Does the plaintiff have any basis for asserting that the adverse employment action was animated by a discriminatory animus?
- Does he/she just think that must be the case?
- Was there policy about reporting problems that the plaintiff ignored?
- Were there other avenues for reporting problems or resolving grievances?
- Are there any complaints or actions that are time-barred because they are "discrete acts" or for which the plaintiff does not have a viable "continuing violation" claim?
- Was there an unreasonable and unexplainable time gap between the time the plaintiff engaged in protected activity and the adverse employment action?
- Is there any dispute about the performance shortcomings?
- Is there any evidence of pretext (stray remarks, changed rationales, different treatment of actual comparators)?
- What has the plaintiff done to mitigate his alleged damages?

One of the main goals in the plaintiff's deposition is to have the plaintiff admit those facts necessary for summary judgment and to essentially obviate the need for defendant's own affidavit.

IDENTIFY AND PREPARE DEFENSE WITNESSES

Of equal importance to pinning the plaintiff's story down is avoiding the defense's undoing at the hands of its own witnesses. You must put yourself in the position of the plaintiff's attorney and thinking critically about how the plaintiff will attempt to use defense testimony. Few things are as nettlesome as a defense witness that goes off the reservation and testifies contrary to the theme you have worked so hard to establish. In prepping your important witnesses, in addition to giving them the well-known traditional rules and prepping them on specific questions, make sure they understand your theme and your story. At the same time, counsel must be cognizant, of course of its responsibility to avoid coaching a witness or providing answers where the witness has none. Keeping that in mind, a well prepared defense witness will be able to counterpunch a little and bring the story back to the narrative. Of course, for summary judgment purposes it is important that key witnesses understand those issues that are not in dispute as well as those that are. Plaintiff's counsel will attempt to create factual disputes by asking witnesses about issues that are not in dispute in the hopes that she will say that they are disputed. This could be useful for the plaintiff in opposing summary judgment.

How will the plaintiff attempt to prove his/her case? In prepping witnesses, counsel should go over the plaintiff's case as set out in demand letters, initial disclosures, case management submissions, arguments in connection with discovery disputes, interrogatories, and the plaintiff's testimony. .

The witness should also be familiar with the defenses discovery responses. Few things can doom a potential summary judgment motion as quickly as testimony contradicting written discovery that the witness himself has certified.

IDENTIFY INADMISSIBLE EVIDENCE

Defense counsel should evaluate the evidence in support of the motion and make sure it is admissible. Counsel must anticipate potential objections to evidence submitted in support of a motion for summary judgment. The plaintiff will try to attack the evidence. How is the defense going to parry those arguments?

Anticipate what evidence the plaintiff will offer in opposition to summary judgment and consider whether such evidence is admissible. If the plaintiff offers inadmissible evidence, consider the options. Our own court has recently cautioned against the use of a motion to strike**.** It is probably wiser to attack the admissibility of specific evidence directly in your memorandum of law.

THE SUMMARY JUDGMENT PLEADING

It goes without saying that counsel must familiarize herself with the summary judgment rules and timeframes. One should not expect the court to be understanding about a late filing. Summary judgment deadlines are set out in the scheduling order. Counsel should keep in mind the page limit (usually 25 pages unless leave is granted) and determine whether the court will count your statement of uncontested facts (usually it will) in your page limit.

- The statement of undisputed facts is critical. The rules require it and counsel must pay attention to them. There must be specific citations to the record. The judges differ somewhat as to what effect they will give to the Plaintiff's failure to specifically counter those facts with citations to the record. Judges do not want to have to go digging through the record to find facts in dispute but they have done it even where the plaintiff has failed to comply with the rule. Nevertheless this is no reason for defense counsel to ignore its duty to comply with the rule. It remains a good opportunity to instruct the court, in concise fashion, as to what is not in dispute.
- The statement of undisputed facts should be the material facts really needed for summary judgment. If it is not material it should be left out. They must correctly cite to the record. An overworked clerk is checking on the cites. It makes no sense to aggravate them or give them any reason to question counsel's competence.
- Argue from the facts—not about the facts. Any argument about the facts is going to doom the motion.
- Speculation" is not "inference." The plaintiff will argue that anything can be inferred from everything. You need to give the judge the tools to brush away those arguments.
- Begin with a short (one page or less) introduction designed to interest the court and to explain to the court why it should rule for the defense when summary judgment is the exception and not the rule. Something on the order of "There are three reasons why ABC Company is entitled to Summary judgment in this case. (1), (2), (3)" should be considered. It is a bad idea to begin the brief with a recitation of the counts of the complaint. It is boring, and the court's first information about the case should be the company's side of the story—not the plaintiff's. The defendant needs to give the judge a reason to enter judgment in its favor. There are enough cases out there that a court can find support for any determination. Counsel needs to give the judge a reason to look for the cases that support a defense ruling. If defense expects the clerk to do it for him, defense counsel will lose.
- It is called a brief for a reason. Shorter is better. It is also much harder. Counsel must be prepared to spend more time editing than drafting.
- The moving party should use the plaintiff's own testimony in the statement of facts. It is much harder for a plaintiff to argue that there are disputed issues of fact when facing his or her own testimony.

- Ad hominem attacks on the plaintiff or his or her counsel should be avoided. These damage the attacker's credibility as much as, if not more than, that of the target. The court will draw its own conclusion.
- String cites should be avoided. If a case is compelling and applicable to the movant's case, it is probably worth its own paragraph.
- Do not make the court search for the evidence supporting the motion for summary judgment. Every factual statement should have a record cite.
- Proofread several times and don't be afraid to ask a colleague to do the same. Don't give the judge any reason to question counsel's professionalism. Typographical errors in a brief stand out and send the wrong message.
- Contemplate oral argument before submitting the brief. Does the brief hit the key points?
- Are those points front and center?

- "**ORAL ARGUMENT — STAY FOCUSED**

  - Don't request oral argument if you have nothing important to add.
  - If there is argument, don't rehash the brief. Counsel should assume the court has read everything. Of course, counsel needs to do the same. The court, like the client, should come away from the argument secure in the knowledge that counsel is on top of this.
  - Request time for rebuttal but don't feel obliged to use it.

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